

ADVISORY OPINION 2000-007

Any advisory opinion rendered by the registry under subsection (1) or (2) of this section may be relied upon only by the person or committee involved in the specific transaction or activity with respect to which the advisory opinion is rendered. KRS 121.135(4).

September 11, 2000

Hon. Jon A. Woodall
McBrayer, McGinnis,
Leslie & Kirkland PLLC
163 W Short St, Ste 300
Lexington, KY 40507-1361

Dear Mr. Woodall:

This is in response to your July 17, 2000 request for an advisory opinion regarding the organization of an independent expenditure committee under KRS Chapter 121.

Your letter explains that you represent Citizens for a Better Lexington (“the Group”), a group of concerned citizens who intend to function on a continual basis, independent of any particular candidate or campaign committee, to engage in soliciting contributions and to advocate the election or defeat of specific candidates. Further, you state that the Group does not intend to make direct contributions to candidates; rather, the Group intends to make independent expenditures, as defined by KRS 121.015(12).

You request a response regarding the application of KRS Chapter 121 to the following issues:

ISSUE 1: Whether it is permissible to establish a independent expenditure committee since no statutory prohibition against such a committee is found in KRS Chapter 121.

KRS 121.015(3) provides in pertinent part that

“Committee” includes the following:

- (a) “Campaign committee,” which means one (1) or more persons who receive contributions and make expenditures to support or oppose one (1) or more specific candidates or slates of candidates for nomination or election to any state, county, city, or district office...
- (b) “Political issues committee,”
- (c) “Permanent committee,” which means a group of individuals, including an association, committee or organization, other than a campaign committee, inaugural committee, or party executive committee, which is established as, or intended to be, a permanent organization having as a primary purpose expressly advocating the election or defeat of one (1) or more clearly identified candidates, slates of candidates, or political parties, which functions on a regular basis throughout the year;
- (d) An executive committee of a political party; and
- (e) “Inaugural committee,” (Emphasis added.)

As you correctly state in your letter, KRS 121.015(3) does not expressly prohibit the establishment of an independent expenditures committee. In KREF Advisory Opinion 95-012, the Registry opined that an individual who intended to raise funds for the purpose of making independent expenditures supporting a clearly identified candidate would be required to establish an unauthorized campaign committee.

However, the 1996 General Assembly amended KRS 121.015(3) to expressly provide that a “permanent committee” included “a group ... having as a primary purpose expressly advocating the election or defeat of one (1) or more clearly identified candidates.” (Emphasis added.) Further, KRS 121.015(7)(c) was amended to expressly distinguish “contribution” from “[a]n independent expenditure by any individual or permanent committee.” (Emphasis added.)

Therefore, the Group, which is organized independent of any particular candidate or campaign committee and intends to function on a continual basis and to have as its sole purpose to solicit contributions and expend sums to advocate the election or defeat of clearly identified candidates for public office without any coordination, consultation or cooperation with any candidate, is a permanent committee under KRS 121.015(3)(c).

ISSUE 2: Assuming that establishment of a independent expenditure committee is permissible, whether such a committee is constrained by the same filing and reporting requirements as other “committees” defined in KRS 121.015(3).

As a permanent committee, the Group is required to register with the Registry under KRS 121.170(1) and report on a quarterly basis “all money, loans, or other things of value, received by it from any source, and all expenditures” in accordance with KRS 121.180(6). Itemized information must be provided for each contribution over one hundred dollars (\$100.00).

In addition, the Group must report its independent expenditures when they exceed five hundred dollars (\$500) in the aggregate during an election. As opined in KREF Advisory Opinion 95-012, KRS 121.150(1) requires a representative from the committee to sign a sworn statement on a separate form (See 32 KAR 1:080. KREF 013, Report of an Independent Expenditure.), provided by the Registry, that each expenditure was made without any coordination, consultation or cooperation with any candidate, slate of candidates or campaign committee. There is no requirement that individuals who contribute to the Group file separate independent expenditures reports, provided their contributions are itemized pursuant to KRS 121.180(6).

ISSUE 3: Assuming that establishment of a independent expenditure committee is permissible, whether there is a limitation to the amount that an individual may contribute to such a committee.

Your letter seeks to distinguish the Group from committees seeking to make expenditures in coordination with candidates or seeking to contribute to candidates “in addition to independent expenditures.” You argue that to permit an individual or group to make unlimited independent expenditures, while limiting the amount an individual may contribute to a group organized solely to make independent expenditures violates the holding in Buckley. In your supplemental letter, you concede that the Group “would function as many political committees do,” including soliciting funds via oral and written requests and organized fundraising events. You state that contributors would have input regarding how funds are expended, as with any other membership organization, but expenditures would be made by the Group.

KRS 121.150(10) limits the aggregate contributions from a person to all permanent committees to one thousand five hundred dollars (\$1,500) per year. In Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637 (6th Cir. 1997), the Court of Appeals for the Sixth Circuit upheld this annual limit on contributions to permanent committees.

Section 121.150(10) does not limit direct contributions to candidates or independent expenditures. Rather, it only limits aggregate contributions to permanent committees, which generally have full discretion to disburse the funds in any manner. Plaintiffs’ challenge, therefore, involves what the Supreme Court has characterized as “speech by proxy” because the actual expenditure is made by the permanent committee not the individual. California Med. Ass’n v. FEC, 453 U.S. 182, 196, 101 S. Ct. 2712, 2721-22, 69 L.Ed.2d 567 (1981). The Court has

clearly stated that this type of political speech, while not entirely unprotected by the First Amendment, does not receive the full First Amendment protection afforded direct political contributions because limitations on contributions to permanent committees do not significantly infringe First Amendment rights. Id. at 196-97, 101 S.Ct. at 2721-22.

Terry, 108 F.3d at 648. (Emphasis added.)

Recently, the United States Supreme Court, in a six (6) to three (3) decision, reaffirmed the Buckley distinction between contributions and expenditures in Nixon v. Shrink Missouri Government PAC, 120 S.Ct. 897 (2000). In its majority opinion, the Court interpreted Buckley to hold that contribution limits imposed only marginal restrictions on speech and on the association right. Nixon, 120 S.Ct. at 903-905.

Therefore, while no limit may be placed on the amount an individual or committee may expend on communications made independently of a candidate, see KRS 121.015(7)(c), limits on the amount an individual may contribute to a committee have been upheld. As your supplemental letter explains, lower courts have addressed the issue of limiting independent expenditures; however, no case has held that limits, per se, on contributions to committees that make independent expenditures are unconstitutional. To the contrary, the Supreme Court has consistently upheld a distinction with difference between contributions and expenditures, holding that contributions should be analyzed as “speech by proxy.”

Therefore, under KRS 121.150(10), an individual may not contribute more than \$1,500 per year to all permanent committees, including a permanent committee organized solely to make independent expenditures.

This opinion reflects the Registry’s consideration of the specific transactions posed by your letter. If you have any additional questions, please do not hesitate to contact the Registry staff.

Sincerely,

Rosemary F. Center
General Counsel

RFC/jh

Cc: Registry Board Members
Sarah M. Jackson, Executive Director